Jusy ak Mesin & Ors v Pembinaan BLT Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–235 OF 2009-I
SANGAU GUNTING J
26 NOVEMBER 2012

Evidence — Burden of proof — Whether plaintiff had proven its claims — Plaintiffs claimed NCR over land — Whether burden of proving exact location of land would lie with plaintiffs — Whether plaintiffs had to bear burden of proving that land was outside river reserve

Native Law and Custom — Land dispute — Customary right over land — Whether plaintiffs had NCR over land — Whether plaintiffs had proved exact location of land claimed — Whether land situated on river bank reserve — Whether plaintiffs had waived their NCR by allowing non-native to use NCR land — Whether plaintiffs had ample opportunities to pursue their rights pertaining to land

By this suit against the defendants the plaintiffs were claiming various declaratory orders, one of which was a declaration that the plaintiffs had native customary rights ('NCR') over the whole of the disputed land that predated the Sarawak Land Code ('the Land Code'), which came into force in 1958. The defendants contended that since the plaintiffs had failed to establish the exact location, size and measurement of the land presumably over which they claimed NCR their claim ought to be dismissed outright. Alternatively the second and third defendants claimed that the plaintiffs could not claim NCR over the land because the land was within the river reserve. The defendants further submitted that the plaintiffs had no solid proof of ownership, in that there was no evidence adduced to prove that the plaintiffs' ancestors did in fact clear and cultivate the land claimed by them before 1 January 1958, as required under s 5 of the Land Code. According to the defendants the evidence adduced by the plaintiffs was mere self-serving statements that were unsupported or corroborated by any independent cogent evidence. The second and third defendants also submitted that the plaintiffs had entered into a settlement deed with non-natives to permit the latter to use the land after receiving a payment of RM9,000 from the latter. It was thus the defendants' argument that the plaintiffs had waived their NCR when they permitted the land to be used by non-natives. The settlement officer ('the SO') testified that that the plaintiffs had never submitted their claims for the land and that based on a ground survey over the settlement area done by the Lands and Surveys Department, the land was adjudicated as riverbank reserve. The SO further testified that he

was only aware of the plaintiffs' claim during this proceeding. Based on this evidence the defendants argued that the plaintiffs had not submitted any claim in respect of their NCR over the land and therefore no document of title was issued to them pursuant to the settlement operation. The defendants also argued that if the plaintiffs had submitted their claim over the land when the settlement operation was carried out by the SO but had not been issued with a document of title in respect of the land they should lodge an appeal against the decision of the SO but the plaintiffs had failed to do so. As such, the defendants contended that the plaintiffs were evading the requirements provided in s 102 of the Land Code, such as the need to appeal within three months from the date of the publication in the *Gazette* of the settlement order by filing the present suit.

Held, dismissing the plaintiffs' claim with costs to be taxed unless agreed:

(1) It was clearly incumbent upon the plaintiffs to prove their case, including showing the exact location of the land over which they claim to have exercised NCR. However, based on the evidence adduced at trial there still persisted serious uncertainty as regards the exact location and boundary of the land. The need to prove the exact boundary of the land and the burden of proving that the land was outside the river reserve would lie with the plaintiffs. It was incumbent upon the plaintiffs to prove on a balance of probability that the NCR claimed by them over the land had persisted since the pre-1958 clearance of primary forest and had never been extinguished until the filing of the instant suit. However, from the evidence adduced the plaintiffs had failed to discharge that burden of proof (see paras 16, 41–44).

(2) In substance it would appear that the plaintiffs had allowed the land over which they claimed NCR to be used by non-natives. The manner the plaintiffs handled their purported NCR in respect of the disputed land, ie permitting the land to be used by non-natives, was indicative of their having agreed to compromise on their NCR (see paras 48 & 49).

(3) Evidence came to light that in 1978 the Lands and Surveys Department had carried out a settlement operation over the area covering the disputed land for the purpose of issuing land titles to the land claimants. The testimony of the SO also revealed that the owners of lands adjacent to the disputed land were issued with documents of title. However, the plaintiffs had not protested or complained over the non-issuance of documents of title but remained silent despite knowing that the other claimants had been issued with documents of title to their lands pursuant to the settlement operation. Thus, it would be fair and reasonable to infer that at all material times there were ample opportunities for the plaintiffs to pursue their rights pertaining to the subject land at the relevant Lands and Surveys Department but they had not (see paras 67–73 & 77).

[Bahasa Malaysia summary

Melalui guaman ini terhadap defendan-defendan, plaintif-plaintif menuntut pelbagai perintah deklarasi, salah satunya adalah deklarasi bahawa plaintif-plaintif mempunyai hak-hak adat anak negeri ('HHAAN') ke atas seluruh tanah yang dipertikaikan yang wujud sebelum Kanun Tanah Sarawak ('Kanun Tanah tersebut'), yang mula berkuat kuasa pada tahun 1958. Defendan-defendan berhujah bahawa oleh kerana plaintif-plaintif telah gagal membuktikan lokasi, saiz dan ukuran sebenar tanah yang mana mereka dikatakan menuntut HHAAN mereka maka tuntutan mereka patut ditolak sama sekali. Secara alternatif defendan-defendan kedua dan ketiga mendakwa bahawa plaintif-plaintif tidak boleh menuntut HHAAN ke atas tanah tersebut kerana tanah tersebut dalam rizab sungai. Selanjutnya defendan-defendan berhujah bahawa plaintif-plaintif tiada bukti kukuh pemilikan, di mana tiada keterangan dikemukakan untuk membuktikan keturunan plaintif-plaintif sememangnya telah menerangkan dan mengusahakan tanah tersebut yang dituntut oleh mereka sebelum 1 Januari 1958, sebagaimana dikehendaki di bawah s 5 Kanun Tanah tersebut. Menurut defendan-defendan keterangan yang dikemukakan oleh plaintif-plaintif hanya kenyataan-kenyataan demi kepentingan sendiri yang tidak disokong atau disokong oleh apa-apa keterangan asing yang meyakinkan. Defendan-defendan kedua dan ketiga juga berhujah bahawa plaintif-plaintif telah memasuki surat ikatan penempatan dengan bukan pribumi untuk membenarkan mereka yang bukan pribumi ini menggunakan tantah tersebut selepas menerima bayaran RM9,000 daripada mereka yang bukan pribumi tersebut. Oleh itu adalah hujah defendan-defendan bahawa plaintif-plaintif telah mengetepikan HHAAN mereka apabila mereka membenarkan tanah tersebut digunakan oleh bukan pribumi. Pegawai Penempatan ('PP') telah memberi keterangan bahawa plaintif-plaintif tidak pernah mengemukakan tuntutan mereka ke atas tanah tersebut dan bahawa berdasarkan kaji selidik tanah ke atas kawasan penempatan yang dilakukan oleh Jabatan Tanah dan Ukur, tanah tersebut diputuskan sebagai rizab benteng sungai. PP selanjutnya memberi keterangan bahawa dia hanya mengetahui tentang tuntutan plaintif-plaintif semasa prosiding ini. Berdasarkan keterangan ini defendan-defendan berhujah bahawa plaintif-plaintif tidak mengemukakan apa-apa tuntutan berkaitan HHAAN mereka ke atas tanah tersebut dan oleh itu tiada surat ikatan hak milik telah dikeluarkan kepada mereka menurut operasi penempatan. Defendan-defendan juga berhujah bahawa jika plaintif-plaintif telah mengemukakan tuntutan mereka ke atas tanah tersebut apabila operasi penempatan dijalankan oleh PP tersebut tetapi tidak pula dikeluarkan surat ikatan hak milik berkaitan tanah tersebut maka mereka patut membuat rayuan terhadap keputusan PP tetapi plaintif-plaintif telah gagal untuk berbuat demikian. Oleh itu, defendan-defendan menegaskan bahawa plaintif-plaintif mengelak keperluan yang diperuntukkan dalam s 102 Kanun Tanah tersebut,

seperti keperluan untuk merayu dalam tempoh tiga bulan dari tarikh terbitan dalam *Warta* perintah-perintah penempatan dengan memfailkan guaman ini.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos yang dikenakan cukai kecuali dipersetujui:

(1) Adalah wajib untuk plaintif-plaintif membuktikan kes mereka, termasuklah menunjukkan lokasi sebenar tanah tersebut yang mana didakwa mereka mempunyai HHAAN. Walau bagaimanapun, berdasarkan keterangan yang dikemukakan semasa perbicaraan masih terdapat ketidakpastian serius behubung lokasi dan sempadan sebenar tanah tersebut. Keperluan untuk membuktikan sempadan sebenar tanah tersebut dan beban membuktikan bahawa tanah tersebut adalah di luar rizab sungai terletak dengan plaintif-plaintif. Adalah penting untuk plaintif-plaintif membuktikan atas imbangan kebarangkalian bahawa HHAAN yang dituntut oleh mereka ke atas tanah tersebut masih berterusan sejak sebelum tahun 1958 apabila hutan primer diterangkan dan tidak pernah dihapuskan sehingga pemfailan guaman ini. Walau bagaimanapun, berdasarkan keterangan yang dikemukakan plaintif-plaintif telah gagal untuk melepaskan beban bukti tersebut (lihat perenggan 16, 41–44).

(2) Secara substantif ia kelihatan bahawa plaintif-plaintif telah membenarkan tanah yang mereka menuntut HHAAN itu digunakan oleh bukan pribumi. Cara plaintif-plaintif mengendalikan HHAAN dikatakan mereka itu berkaitan tanah yang dipertikaikan, iaitu membenarkan tanah tersebut digunakan oleh bukan pribumi, menunjukkan yang mereka telah bersetuju untuk berkompromi dengan HHAAN mereka (lihat perenggan 48–49).

(3) Keterangan menunjukkan bahawa dalam tahun 1978 Jabatan Tanah dan Ukur telah menjalankan operasi penempatan ke atas kawasan yang meliputi tanah yang dipertikaikan bagi tujuan mengeluarkan surat ikatan tanah kepada tanah penuntut-penuntut. Testimoni PP juga menunjukkan bahawa pemilik-pemilik tanah-tanah yang bersebelahan tanah yang dipertikaikan telah dikeluarkan surat ikatan hak milik. Walau bagaimanapun, plaintif-plaintif tidak membantah atau mengadu tentang surat ikatan hak milik yang tidak dikeluarkan dan berdiam diri meskipun mengetahui bahawa penuntut-penuntut lain telah dikeluarkan surat ikatan hak milik ke atas tanah mereka menurut operasi penempatan itu. Oleh itu, adalah adil dan munasabah untuk membuat inferens bahawa pada setiap masa matan terdapat peluang yang mencukupi untuk plaintif-plaintif meneruskan hak-hak mereka berkaitan tanah tersebut di Jabatan Tanah dan Ukur tetapi mereka tidakpun berbuat demikian (lihat perenggan 67–73 & 77).]

Notes

For a case whether plaintiff had proven its claims, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 786.

For cases on customary right over land, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 682–711.

Cases referred to

Barraclough v Brown [1897] AC 615, HL (refd)

Hamit bin Matusin v Superintendent of Lands and Surveys & Anor [2001] 3 MLJ 535; [2001] 6 CLJ 303, HC (refd)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41, FC (refd)

Professor Dr Akahar Bador & Ors v Krishnan & Ors (No 2) [1983] 1 MLJ 412 (refd)

Udin Anak Lampon v Tuai Rumah Utom [1949] SCR 3, SC (refd)

Legislation referred to

Evidence Act 1950 s 101

Federal Constitution art 8

Land Settlement Ordinance s 66

Sarawak Land Code (Cap 81) ss 5, 5(2), 8, 10, 10(1), 15, 18, 34(1), (3), 38, 84(1)(3), 91, 93, 94, 94(1), 95, 96, 102, 102(1)

Wendy Jorai (Norida Sipek with her) (Penrissen Advocate) for the plaintiffs.
Addy Termizi (Merikan & Association) for the first defendant.
McWillyn Jiok (State Counsel, State Attorney General's Chambers) for the second and third defendants.

Sangau Gunting J:

INTRODUCTION

[1] As against the first defendant, the plaintiffs are claiming for damages. As against the second and third defendants, the plaintiffs are claiming for native customary rights ('NCR'). More specifically, by this action the plaintiffs are seeking:

(a) a declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over the said native customary land;

(b) a declaration that this native title and/or rights precludes the first defendant from impairing or abridging the plaintiffs' said rights and/or from issuing any lease which affects their said native title and/or rights;

(c) a declaration that the impairing of the plaintiffs' rights in or over the said

native customary land constitutes a violation of art 8 of the Federal Constitution (equality before the law);

(d) alternatively, a declaration that the occupation of the said land was in breach of s 8 and/or s 15 of the Land Code (Cap 81);

(e) a declaration that the defendants or their servants or agents are trespassing on the plaintiffs' said native customary land and/or otherwise unlawfully interfering the plaintiffs' rights in or over the said land;

(f) an order directing the defendants and/or the Director of Lands and Surveys Sarawak to give effect to the aforesaid declarations;

(g) an order that the plaintiffs be given forthwith vacant possession of the said native customary land;

(h) a prohibitory injunction restraining the defendants and/or their servants and/or agents from trespassing, clearing, using or occupying the plaintiffs' said native customary land;

(i) a mandatory injunction against the defendants and/or their servants and/or agents to cease operations and remove all structures and their equipments or machineries from the plaintiffs' said native customary land fortwith;

(j) under para 23, exemplary damages, alternatively, aggravated damages;

(k) damages;

(l) alternatively, an order that the damages be assessed accordingly;

(m) interests;

(n) costs; and

(o) such further and/or other relief this honourable court deems fit and just.

THE PARTIES' RESPECTIVE VIEWS OF WHAT THE ISSUES FOR DETERMINATION OUGHT TO BE

[2] According to the plaintiff's advocates, the issues are:

(a) whether the plaintiffs have native title and/or native customary rights over the disputed land;

(b) whether the disputed area falls within riverbank reserve; and

(c) whether the plaintiffs are entitled for a damages (sic) against the first defendant on the trespasses of (sic) native customary land.

[3] In his submission, learned counsel for the second and third defendants outlines the manner he wishes to deal with what in his view are the issues in this case, as follows:

(a) whether the plaintiffs have native customary rights (NCR) over the purported (sic) or any part thereof:

(i) the law relating to the creation of NCR;

(ii) whether the plaintiffs have established the creation and/or acquisition of native customary rights in accordance with s 5 of the Land Code (Cap 81)?

(iii) whether the plaintiffs have established and/or proved the locality of the land claimed by them?

(iv) in alternative, whether the plaintiffs can create or acquire NCR over river reserve? and

(v) whether the plaintiffs have waived their NCR, if any, over the purported land?

(b) whether the declaration order by the court would amount to the process governed by ss 93 to 96 of the Land Code (Cap 81)?

(c) whether the commencement of this suit is an abuse of legal process? and

(d) the damages issue.

[4] Learned counsel for the first defendant sees the main issues as could presumably be gleaned from the relevant pleadings, as follows:

(a) whether the first defendant should be a party to this proceeding?

(b) whether the plaintiffs have the native customary rights over the said land claimed? and

(c) whether the plaintiffs claim of crops as stated in the table at p 11 of BOP (presumably bundle of pleadings) reasonable?.

[5] By this suit against the defendants the plaintiffs are claiming for various declaratory orders, one of which is a declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over the said native customary land. Anyway, it would appear that the first defendant's counsel dealt mainly with the following issues:

(a) whether the first defendant should be a party to this proceeding;

(b) whether the plaintiffs have the native customary rights over the said land claimed? and

(c) whether the plaintiffs claim of crops as stated in the table at p 11 of BOP reasonable.

ISSUES RAISED DURING CLARIFICATION

[6] Contrary to the view of learned counsel for the second and third defendants, learned counsel for the plaintiffs disagreed that the plaintiffs' claim against the first defendant is dependent upon the success or otherwise of the plaintiffs in establishing their NCR on the disputed land. The reason given is that 'the 1st Defendant and/or their agent has struck a written Agreement which is the Settlement Deed … in which the 1st Defendant's agent by entering the Agreement has agreed that the plaintiffs has the Native Customary Rights over the disputed land'. Learned counsel for the second and third defendants replied to the effect that by entering into the said settlement deed the court cannot assume or presume the first defendant had recognised the plaintiff's NCR.

[7] The parties to the 'settlement deed' dated 14 July 2008 are Chiu Chuan Ching, Jusy ak Mesin, Noni ak Duing and Kerry ak Duing. The writ of summons of the instant case was filed on 19 November 2009. The first, second and third plaintiffs in the writ of summons are respectively Jusy ak Mesin, Noni ak Duing and Kerry ak Duing, while the first, second and third defendants therein are respectively Pembinaan BLT Sdn Bhd, the Superintendent of Land and Survey, Kuching Division, Sarawak and the Government of the State of Sarawak. While the 'settlement deed' refers to Chiu Chuan Ching being 'the Contractor … duly empowered Power of Attorney for MENCHUNMA SDN BHD … the main Contractor appointed by the Federal Government to carry out a contract … known as '*Cadangan Membina dan Menyiapkan Bangunan Tambahan Pusat Latihan Polis (PULAPOL) Kuching* … and which work has to be carried out on and upon the said Land', the nexus between him or for that matter between Menchunma Sdn Bhd and the first defendant seems unascertained and was actually not alluded to at all (in the settlement deed).

[8] And to complicate matters, the instant suit in which Chiu Chuan Ching was, in any case, never a party, was instituted against the first, second and third defendants more than a year after the 'settlement deed' was executed. And the situation seems to have been further blurred by the fact, that the 'settlement deed' contemplates of the 'landowner' (presumably Jusy ak Mesin, Noni ak Duing and Kerry ak Duing) being 'the rightful owner of all that parcel of land of up to 1.746 acres situate at Sungai Kisa, Tembangkang, Kampung Bawang outside the river reserve area as per Annexure 1 hereto …' was entered into between an alleged non-native and natives.

[9] With respect, notwithstanding the first defendant's implied concession that Chiu Chuan Ching was its 'agent', there seems to be nothing substantial which could be gleaned from the circumstances arising from the so-called 'settlement deed' that could support the aforesaid contention of counsel for the plaintiffs, to the effect that presumably the first defendant's 'agent' having entered into the 'settlement deed', the implication must be, that the first defendant 'has agreed that the Plaintiffs has the Native Customary Rights over the disputed land'. It would, therefore, be tenable the contention of counsel for the second and third defendants to the effect, that notwithstanding the 'Settlement Deed', the plaintiffs must nevertheless establish their claims to NCR in order for them to succeed in their action against the first defendant and presumably also against the second and third defendants.

THE EXACT LOCATION ISSUE

[10] Before proceeding to delve into, inter alia, the issue of whether the plaintiffs have native customary rights (NCR) over the NCR land claimed by them, perhaps it would be useful to examine the issue of whether the plaintiffs have established and/or proved the exact locality of the land claimed by them.

[11] Indications in the pleadings of the purported locality of the land concerning which the plaintiffs are claiming NCR are as follows:

(a) 'The Plaintiffs claim … their natives rights in Sungai Kisa, Tembangkang, Kampung Bawang, Jalan Puncak Borneo, Kuching, Sarawak'; (para 1, statement of claim (SOC)); PW1's testimony reflects in toto this averment;

(b) 'The Plaintiffs' native rights cover the whole land area which was 3 acres before the Sarawak land law came into force in 1958'; (para 5, SOC);

(c) 'The Plaintiffs' ancestor applied to the Sarawak Agriculture Department for rubber scheme of which was approved by the Department in 1942'; (para 5, SOC);

(d) 'The Sarawak Agriculture Department not only gave the trees but also issued a card to prove their ancestor's participation in the (rubber) scheme'; (para 6, SOC); and

(e) 'The Plaintiffs aver that at all material times, they have acquired native customary rights and/or native title and/or usufructuary rights over the lands at and/or around the communities at Sungai Kisa, Tembangkang, Kampung Bawang, Jalan Puncak Borneo, Kuching, Sarawak'; (para 7(a) SOC).

[12] In its statement of defence, the first defendant avers it has no knowledge of all the above (paras 5–7) and put the plaintiffs to strict proof. Similarly, the

second and third defendants in their statement of defence dispute the said averments in paras 5–7 of the statement of claim and put the plaintiffs to strict proof.

[13] Learned counsel for the second and third defendants contends the plaintiffs have failed to establish the location of the land presumably over which they claim NCR, 'therefore, their claim ought to be dismissed outright'. Counsel says, the accuracy of the aerial photographs exhs D-DBOD(2)-25-33 depends on the accuracy of the map ID-PBOD-3, but that map was not tendered as an exhibit. He further contends, 'since the accuracy of ID-PBOD-3 has never been established during the trial and/or wanting in legal effect … this documentary evidence ought to be valued and viewed with great care by this Honourable Court'.

[14] The plaintiffs' submission dated 17 May 2012 appears intended to reply specifically to the aforesaid submission of the second and third defendants is dated 25 April 2012. However, closely perused there is no specific reply pertaining to the precise location issue. Only in court during clarification did the plaintiffs' counsel submitted: '… (T)he proof of the exact location of the land claimed by the Plaintiffs is not solely based on the map at page 3 of PBOD (presumably ID-PBOD-3). The reason is that in the Statement of Claim the Plaintiffs claimed their Native Customary Rights in Sg. Kisa, Tembangkang and the map (presumably ID-PBOD-3) was never annexed or attached to the Statement of Claim and the defence of the 1st, 2nd and 3rd Defendants is that the area claimed by the Plaintiffs is falls under riverbank reserve. Without this map, how could the Defendants are very sure that the land claimed by the Plaintiffs falls under the riverbank reserve? The evidence adduced by the witnesses i.e. PW1, PW2, PW3 and PW5 are consistently referred to the same area. PW5, Johem ak Bana also confirmed that PW1 land is adjoined to this (the word 'this' ought to have been 'his') land which is lot 224. And my other submission is that if the Defendants dispute the exact location, what is the purpose they prepared pages 31, 32 and 33 of DBOD(2)? The study of the aerial photographs seems like the 2nd and 3d Defendants are confirming the location of the land claimed by the Plaintiffs. They can choose not to do the study, if they are not sure of the exact location.'

[15] The second and third defendants' counsel replied: 'The Issue of the location was only raised during the submission and after ID-PBOD-3 has not converted into an exhibit. The preparation maps at page 31, 32 and 33 of DBOD(2) was done before the trial itself. During the trial we anticipate the maker of ID-PBOD-3 to be called to testify and tender ID-PBOD-3 into exhibit. Without ID-PBOD-3, the 2nd and 3rd Defendants would have no knowledge of the exact location of the land claimed by the Plaintiffs. Paragraph 5 of the Statement of Defence said that the land claimed by the Plaintiffs is

within river reserve but in fact the 2nd and 3rd Defendants have no knowledge of the exact location, the size and measurement of the Plaintiffs' purported Native Customary Rights land. In the event the Court decides that the Plaintiffs had Native Customary Rights over the subject land, the order would be subject to uncertainty because there is no exact location, no exact measurement of the land claimed by the Plaintiffs. Even though the Plaintiffs claimed that the location of the land is at Sg. Kisa there is no exact measurement and boundaries of the land claimed by the Plaintiffs, the order made by the Court would be unsustainable.'

[16] In deciding the immediate issue, it must not be overlooked upon which party lays the burden of proof. Quite clearly it is incumbent upon the plaintiffs to prove their case, including showing the exact location of the parcel of land over which they claim to have exercised native customary rights. In the circumstances of this case, to rely on the defence evidence to answer the exact location issue would appear, in any case unsatisfactory, especially when the plaintiffs themselves for some reasons best known to them, did not call the maker of ID-PBOD-3 and perhaps tender it through that witness with a view to converting it into an exhibit. As matters stand, it would appear the second and third defendants' purported reference and/or description of the land claimed by the plaintiffs would, at best, tantamount to an interpolation of the various relevant portions of the evidence adduced, whereby the defendants presumably came up with a general description of the location of the land area claimed by the plaintiffs. As such, there still persists serious uncertainty as regards the exact location and boundary of the said land.

WHETHER THE PLAINTIFFS HAVE ESTABLISHED NCR

[17] Notwithstanding the uncertainty of the exact location and boundary of the land claimed by the plaintiffs, nevertheless it would appear appropriate to proceed with a consideration of the issue whether the plaintiffs have succeeded in establishing NCR over the land even if based on merely the general location as could be interpolated or gleaned from the evidence adduced by both parties.

[18] It would appear to be the plaintiffs' case that the land in question was inherited by PW1 from her late husband, Duing ak Nyanging. In her witness statement PW1 testified her late mother in law gave the land having an area of about three acres. According to her, she was informed by her mother in law, Moik ak Sukong, she (her mother in law) inherited the land from her father, presumably PW1's husband's grandfather. It is also PW1's evidence that in 1942 her father in law Nyugen ak Sikat applied to the Sarawak Agriculture Department for a rubber scheme. PW1 testified of her late mother in law of presumably having told her there were rubber trees planted on the said land even before the rubber scheme. According to PW1 when the said land was

given to them (presumably her and her late husband), the land was already planted with *durian*, *cempedak*, *mengkabang*, *rambai* and some other local fruit trees.

[19] It is the second and third defendants' case, and with respect I agree, that the burden is upon the plaintiffs to prove that the NCR allegedly acquired were created before 1958. The second and third defendants submit: '(T)here was no evidence adduced by the Plaintiffs to prove that his (sic) ancestor did in fact cleared and cultivated the land claimed by them before the 1st day of January, 1958 as required under section 5 of the Land Code. What was adduced by the Plaintiffs is mere self-serving statement and unsupported or corroborated by any independent cogent evidence. Even if such evidence is adduced, it did not proof (sic) that the purported native customary right belonged to her family'.

[20] PW3, Rijen ak Meoi, who was appointed as the *ketua kampung* since October 2010, testified the NCR 'at Sungai Kisa, Tembangkang, Kampung Bawang, Jalan Puncak Borneo, Kuching, Sarawak belong to plaintiffs'. He testified therein he was informed 'by our ancestors that the 1st Plaintiffs husband (sic) ancestors have cultivated the land. They have planted pokok dabai, rambai, nangka, koko, tampoi, durian, kuini, kopi, jambu merah, manggis, bekara, belimbing, jambu batu, mangga, asam pelam, rambutan and getah'. PW3 further testified when he was small he saw the first plaintiff and their family members working on the said land for many years. In cross-examination PW3 who, based on his NRIC was born in 1968, testified the plaintiffs' ancestors 'were staying on the said land since 1942'.

[21] Learned counsel for the second and third defendants contends as unsustainable PW3's evidence as 'he has no direct knowledge pertaining to the rightful owner of the land except been informed by the plaintiffs and the previous Ketua Kampung'. Counsel says PW3's evidence is at best mere hearsay. In the circumstances, it would appear justified to be cautious of PW3's evidence. Beside his testimony being substantially hearsay, it may be prudent to also keep in mind that PW3 is related to the plaintiffs in that, PW1's late husband was his uncle being the brother of PW3's mother.

THE RELEVANT LAWS IN BRIEF

[22] The second and third defendants' counsel's cites s 101 of the Evidence Act 1950 to say that the evidential burden of proof lies upon the plaintiffs. Contending that in the circumstances of this case, acquisition or creation of NCR over the purported land or any part thereof must be in accordance with s 5(2) of the Sarawak Land Code, learned counsel submits, inter alia, the plaintiffs 'never adduced any evidence as to the custom or customary right over the land claimed by them'. Learned counsel also refers to / of the Land

Settlement Ordinance.

THE DEFENDANTS' SUBMISSIONS

[23] The second and third defendants' counsel contends as doubtful the plaintiffs' evidence — presumably including and particularly the evidence of PW1 and PW3 — as to when and who did the clearing of the land in question. He says the plaintiffs' evidence in relation thereto is 'mere bare allegation and afterthought'. He contends the plaintiffs' evidence 'as whom and when the land (sic) cleared and cultivated is unreliable and should not be taken into account in determining the plaintiffs' claim'. As already alluded to earlier, the second and third defendants' counsel further submits 'there was no evidence adduced by the Plaintiffs to prove that his ancestor did in fact cleared and cultivated (sic) the land claimed by them before the 1st day of January 1958 as required under section 5 of the Land Code. What was adduced by the Plaintiffs is mere self-serving statement and unsupported or corroborated by any independent cogent evidence. Even if such evidence is adduced, it did not proof (sic) that the purported native customary right belonged to her family'.

[24] Learned counsel for the first defendant similarly contends the plaintiffs do not have native customary rights over the land in question. From his submission, it would appear the first defendant's counsel discussed his reasons for such a contention under the following headings: (a) the land is of river reserve, (b) the plaintiffs never made claim during the settlement operation, and (c) no solid proof of ownership. Grounds (a)–(b) would later be reverted to.

[25] Concerning ground (c), learned counsel for the first defendant seems to be also of the view presumably that the plaintiffs' testimonies in support of their claim to having NCR over the disputed land are 'basically based on hearsay, the story told to them by their ancestor'. So for instance counsel says PW1 heard about presumably the past history from her husband, the late Duing ak Nyungen, who had presumably heard the past history from his parents, and from other ancestors. It would also appear, that upon being closely cross-examined, if not for information presumably communicated to her by her late parents in law, PW1 actually does not know when was the land in question first cleared, nor does she know who first cleared the land.

[26] Referring to ID-PBOD-4 (a) 'IDENTITY CARD of OWNER OF RUBBER HOLDER', counsel for the first defendant raises some uncertainties in relation thereto, notwithstanding the handwritings on it, inter alia, the name, 'NYUGEN AK SIKAT' (presumably the father of PW1's late husband). Counsel says there was no witness called to confirm on the document. In this

connection, it would appear pertinent to note that PBOD-4(a) has remained as an ID, thereby lending support to the aforesaid uncertainty issue in respect thereto raised by the counsel.

[27] Learned counsel for the plaintiffs submit that 'the native customary rights have been created on the disputed land before 1st January 1958, and maintain that the said land 'was (sic) located at Sungai Kisa, Kampung Bawang, Jalan Puncak Borneo, Kuching, Sarawak'. Essentially based on PW1's testimony on what presumably had been communicated to her by her parents in law, including her evidence that when the disputed land was given to them, it was already planted with local fruit trees such as *durian* and *cempedak*, counsel contends 'the land have (sic) been cultivated and cleared earlier than 1970's'.

[28] The plaintiffs' counsel says the document ID-PBOD-4 (a) 'shows that her late parents in law have (sic) applied for a rubber scheme to Sarawak Agriculture Department in 1942'. She contends although it could not be marked as an exhibit, 'but PW1 has kept this card for over the years when since getting married with (sic) her late husband. She is very sure that locality of the said land stated in the said card is the same as the said area which is claimed by the plaintiffs'.

[29] It would be appreciated, however, as long as ID-PBOD-4(a) remains as an ID, not much reliance could be placed upon its evidentiary weight. What precisely it connotes remains unclear. For instance, as it is, how could ID-PBOD-4 be relied as evidence to show, inter alia, that one Nyungen ak Sikat had actually 'applied to the Sarawak Agriculture Department for a rubber scheme and it was approved by the said Department'? And without calling any witness, say from the appropriate departments such as perhaps the Sarawak Agriculture Department, to testify on the type of conclusions which could be arrived at based on ID-PBOD-4, how could any such conclusions be relied upon as evidence, even on balance of probability? With respect, the answer to this question would have to be in the negative.

[30] The plaintiffs rely on Eexh D-DBOD (2)-25-33 which includes the aerial photographs which presumably cover the area allegedly claimed by the plaintiffs, (see Question and Answer No 8 of 'WSDW2' (DW2 — Stephen Ling Jin Huat). DW2 was called by the second and third defendants. There was no objection subject to cross-examination to the tendering as exhibit of the said aerial photographs and the accompanying report. Learned counsel for the first defendant cross-examined DW2 as to whether he knows the locality of the disputed land and his was, 'Yes'. DW2 testified however he has never been to the disputed area.

[31] Cross-examined by the first defendant's counsel: 'I refer to page 31 (of DBOD-(2)), the one in red line is alleged to be the plaintiffs' claimed land?' DW2 replied, 'Yes'. DW2 then further testified: 'Based on the map, the area within the purple line is the river reserve area and blue colour is the river'. Further cross-examined on the area outside the purple polyline within the area of interest (AOI), DW2 replied to the effect, that it is 'cleared area.'

[32] Neither the plaintiffs' counsel nor either counsel for the first, second and third defendants examined or cross-examined DW2 on what or which specific information such as a map perhaps already adduced in evidence, did DW2 based his evidence that on the map on p 31 of DBOD(2), 'the one in red line is alleged to be the plaintiffs' claimed land'. Neither has any evidence been adduced or elicited to show the total acreage of that area within the red line and the total acreage of the area within the purple line which according to DW2 constitutes the river reserve area. In all probability, the difference between the total acreage of each of the said two areas would have yielded an area claimable by the plaintiffs presumably based on NCR, assuming under the law a river reserve area cannot be claimed even if based on NCR, and assuming further the area within the said red line is actually the area claimed by the plaintiffs in the instant case.

[33] In her witness statement PW1 describes the location of the disputed land at Sungai Kisa, Tembangkang, Kampung Bawang, Jalan Puncak Borneo, Kuching, Sarawak. But when shown the map on p 3 of PBOD, she told the court she cannot read and understand the map. Later in cross-examination however she proceeded to mark 'X' the alleged location of the subject land. Thereafter she had to explain the location of the subject land vis a vis Sungai Simboh (mentioned in ID-PBOD-3) and Sungai Kisa (mentioned by PW1 herself as the place where the disputed land was located). PW3 testified 'the land claimed by the plaintiffs is near to Sungai Kisa and Sungai Simboh because Sungai Kisa is flowing to Sungai Simboh'. PW4, Vitive ak Mesin, testified in cross-examination that the subject land is located at Sungai Kisa. Having been referred to ID-PBOD-3, exhs D-DBOD(2)-23 and p 32 of DBOD(2), particularly the area above Lot 83, he agreed that the river 'across the area of interest (AOI) of the disputed land as shown on the said page 32 is Sungai Simboh. PW4 also agreed that Sungai Kisa 'is located further right from the disputed land …'

[34] Shown ID-PBOD-3 PW5 Johem ak Bana who owned Lot 224/Lot 82 testified Sungai Simboh is 'in the Plaintiffs' land and it is the boundary of my land'. According to him while his land was surveyed, the plaintiffs' land was not. Cross-examined further, he replied the plaintiffs knew about the survey of his land, and that when he showed the boundary of his land to the Lands and Survey Department, Duing ak Nyungen (the first plaintiff's late husband,

PW1) was present. Anyway, it seems the exact boundary and location and hence the exact area of the parcel of land in respect of which the plaintiffs claim to have established NCR remains unascertained.

THE ALTERNATIVE RIVER RESERVE ISSUE

[35] Learned counsel for the second and third defendants ask, in the alternative, whether the plaintiffs can create and/or acquire NCR over river reserve? It seems to be the second and third defendants' alternative submission that the land claimed by the plaintiffs is within river reserve. That being so, the second and third defendants' argument goes, pursuant to s 38 of the Land Code (Cap 81), 'the subject land is reserved to the State Government … The plaintiffs cannot claim their purported native customary rights over the subject land'. Also cited in support of the aforesaid contention is *Hamit bin Matusin v Superintendent of Lands and Surveys & Anor* [2001] 3 MLJ 535; [2001] 6 CLJ 303.

[36] In submitting that the second and third defendants 'have established that the land claimed by the Plaintiffs is within the river reserve', counsel for the second and third defendants appears to have relied substantially on exh D-DBOD(2)-25-33, particularly pp 31–33. The second and third defendants contend the plaintiffs have failed to prove that the land claimed by them is outside the river reserve. The implied assumption here seems to be that the burden of proof has shifted to the plaintiffs. In view of, inter alia, exh D-DBOD(2)-31-33 and the testimony of DW2, such an implication would appear tenable.

[37] Learned counsel for the second and third defendants thereafter says, '… it is pertinent to note that the 'area of interest' as stated in the exhibits (presumably Ex. D-DBOD(2)-31-33) was referred to an area shown in a map marked as ID-PBOD-3 … this ID-PBOD-3 is wanting in terms of legal effect and accuracy … Therefore, the wanting of such evidence or proof would leading (sic) this Honourable Court to inability to decide whether the subject land is within or outside the river reserve. In any event, if this Honourable Court ruled that the land claimed by the Plaintiffs is outside the river reserve, it is my humble submission that only part of the subject was outside the river reserve. This is shown in Ex. DBOD(2)-25-33. The remaining area outside the river reserve was measure (sic) in accordance with section 38 of the Land Code (cap 81)'.

[38] So the situation seems to be such that the uncertainty as to the precise location, the boundaries and exact area of the disputed land still lingers, notwithstanding what seems to be a general consensus of its general location. My understanding of the aforesaid submission of learned counsel for the

second and third defendants is that, the non-tendering as exhibit of ID-PBOD-3 renders it as unacceptable as evidence thereby in any case adversely affecting its evidential value and/or its accuracy. As such, any ascertainment of such general location aforementioned based on ID-PBOD-3 as implied by learned counsel for the second and third defendants in his submission, would also be suspect in terms of evidential weight and accuracy.

[39] The tendering as exhibits of DW2's witness statement 'WSDW2' and DW2's report on aerial photographs, exh D-DBOD(2)-25-33 was not objected to by counsels for the plaintiffs and first defendant. Neither was there any significant challenge to DW2's evidence during cross-examination. Concerning presumably the area within the red line on p 31 of exhs D-DBOD(2)-25-33, DW2 agreed with learned counsel for the first defendant '(the area) is alleged to be the Plaintiffs' claimed land'. Referring to the area of interest (AOI) shown on the said aerial photographs (p 31 of exhs D-DBOD(2)-25-33), in reply to a question posed by the first defendant's counsel, DW2 testified: '… the area within the purple line is the river reserve area and blue colour is the river'.

[40] Concerning the said 'AOI', DW2 agreed with the plaintiffs' counsel to the effect that there would still be remaining land in the AOI even after deducting the area constituting the river itself and the river reserve area within the AOI. Notwithstanding his earlier agreeing with counsel for the first defendant that the area within the red line on p 31 of exh D-DBOD(2)-25-33, is the area 'alleged to be the plaintiffs' claimed land', in reply to the plaintiffs' counsel's question, whether 'there is any possibility this remaining land belong to someone' (presumably after deducting the total area constituting both the river and the river reserve area on the said p 31 of exh D-DBOD(2)-25-33 from the total area within the red line), DW2 replied, 'I do not know'. Perhaps, this is indicative of the still persisting serious uncertainty concerning the exact locality, boundary, area and ownership of the parcel of land claimed by the plaintiffs.

[41] So it seems vis a vis the land claimed by the plaintiffs, the situation is such that to begin with the exact location, the boundary and area have not been sufficiently ascertained. For instance, the location was described as being at Sungai Kisa, but the plaintiffs' own map ID-PBOD-3 seems to show the disputed land is substantially located at Sungai Simbo, of which Sungai Kisa is presumably a tributary. Even assuming that the disputed land is or substantially is the area within the AIO indicated on p 31 of exh D-DBOD(2)-25-33, still there is the uncertainty of the over-all precise area. Remaining unascertained also is the area of the river reserve and the total area taken up by the width of the river along its portion which comes within the AOI, in the context of the overall facts and circumstances of the plaintiffs' claim instituted in 2009.

[42] The plaintiffs having, it seems, accepted exh D-DBOD(2)-25-33 as evidence, it would appear correct the implied submission of learned counsel for the second and third defendants that, presumably in view of ss 10 and 38 of the Land Code (Cap 81), quite apart from the need to prove the exact boundary of the subject land, the burden of proving that the land claimed by the plaintiffs is outside the river reserve lies upon, or perhaps more accurately, shifts to the plaintiffs.

[43] As earlier indicated, to begin with the evidence adduced by the plaintiffs does appear insufficient prove on balance of probability, that they have established NCR over the parcel of land claimed by them. The AIO indicated in exh D-DBOD(2)-25-33 may very well correspond generally to the area claimed by the plaintiffs as per ID-PBOD-3; and as testified to by DW2, the said AOI does appear to have been cleared of presumably primary forest even at the time the aerial photograph on p 31 of exhs D-DBOD(2)-25-33 was taken ie in 1954 which, in the context of s 5(1) of the Sarawak Land Code, would clearly be prior to first day of January 1958.

[44] Nevertheless, the evidence, if there is any at all (there seems to be none), connecting those who originally cleared those primary forest and the plaintiffs' ancestors and thereafter the evidence, if any at all, connecting the plaintiffs' ancestors and the plaintiffs themselves, in any case, seem almost entirely hearsay. In the circumstances, it was incumbent upon the plaintiffs to prove on balance of probability, that the NCR claimed by them over the land in question had persisted since the pre-1958 clearance of primary forest and had never been extinguished until the filing of the instant suit, for example, by the original settlers moving away to another locality (see *Udin anak Lamport v Tuai Rumah Utom*, Sarawak Supreme Court Reports, 13 May 1949 Government Printing Office Kuching Sarawak). It would appear the plaintiffs have failed to discharge that burden of proof.

THE WAIVER ISSUE

[45] It seems to be the second and third defendants' alternative contention that the plaintiffs have waived their right by allowing DW5 who presumably is a non-native to use their claimed NCR land, by receiving payment from DW5. In support, learned counsel for the second and third defendants cited *Udin Anak Lampon v Tuai Rumah Utom* [1949] SCR 3. In that case it was stated: 'Quaere, whether an individual occupant of land by customary tenure can rely on his rights after permitting the land to be used by non-natives'. In relation to this matter, RY Hedges CJ (sitting with two assessors) said: 'In the circumstances we are satisfied that there can be no question in this case of any individual occupation by customary tenure within the meaning of s 91 of the Land Ordinance. Even if the appellant could establish any rights, which is not

the case, it is difficult to see how he could rely on them after permitting the land to be used by non-natives (namely Chinese).'

[46] The aforesaid contention of the second and third defendants appear to refer to the 'settlement deed' shown on pp 2–4 of DBOD(1).

Although admitting having signed the document, the first plaintiff ('PW1') replied in cross-examination that she does not know the document that she signed. The second plaintiff ('PW2') also testified in cross-examination that she is not aware of the 'settlement deed', but she knew that her mother (first plaintiff) did receive a payment of RM9,000 from one Chiu Chuan Ching. Cross-examined what was the payment for, PW2 replied it was for the rental for the workers quarters on the said land. In the same breath, however, she testified to the effect that she did not understand the content of the document. Neither does she know who is Chiu Chuan Ching ('DW5') or from which company is he from. It would appear PW2 was not re-examined on the 'settlement deed' aspect of the cross-examination.

[47] It seems to be the plaintiffs' counsel's submission, that the RM9,000 payment to the plaintiffs was for 'the purpose of allowing and granting a license to the agent of the first defendant to work on the said land'. Referring to DW5's testimony in cross-examination, counsel says the RM9,000 'was never meant to compensate the plaintiff (sic) for the destruction of their land and crops … the compensation was just for the rights to enter the plaintiffs' land without any encumbrance'.

[48] The 'settlement deed' appears to actually 'allow the Contract to proceed with the Federal Contract without prejudice basis to the right of the Landowner to Compensation from the State Government upon the terms set out hereunder'. Among the terms is: 'That the landowner shall allow and grant a licence to the Contractor to work on the said Land based on the Contract and acknowledges that the Contractor enters into this Agreement for the benefit of its employer to enable the implementation of the Contract'. So PW2's understanding of the RM9,000 — payment to be 'for the rental for the workers quarters on the said land' would appear substantially wrong. The immediate issue, however, is whether in having entered into the 'settlement deed' the plaintiffs had, in any case, allowed the land over which they claim to have NCR to be used by non-natives thereby offending principle enunciated by the then Supreme Court in *Udin anak Lampon v Tuai Rumah Utom* [1949] SCR 3.

[49] With respect, in substance it would appear to be so. That notwithstanding, the said 'settlement deed' does seem to be on a without prejudice basis, whereby presumably the plaintiffs' right to compensation from the state government remains intact. However, keeping in mind the enunciation in *Udin anak Lampon v Tuai Rumah Utom*, it seems the

fundamental question remains: Whether, had the plaintiffs' claim to NCR been adequately strong and well-founded, ought not the more appropriate choice for them been to have persisted in fighting for the full recognition of their NCR and thereafter get the commensurate compensation, rather than enter into a deal with a non-native, a deal the nature of which the plaintiffs are not even sure about? The manner the plaintiffs handled their purported NCR in respect of the disputed land, does seem indicative of their having agreed to compromise on their NCR in that, in the first place, individual owners of NCR could and ought not deal with any non-native. Otherwise, as enunciated in *Udin anak Lampon v Tuai Rumah Utom*, 'Even if the appellant (in the instant case, the plaintiffs) could establish any rights … it is difficult to see how he (in the instant case, the plaintiffs) could rely on them after permitting the land to be used by non-natives (namely Chinese)'.

WHETHER THE PLAINTIFFS ARE ASKING THE COURT TO STEP INTO THE SHOES OF THE SETTLEMENT OFFICER

[50] Citing in support, inter alia, ss 84(1) and (3), 94(1), 95 of the Land Code, the second and third defendants' counsel contends: 'Having regards to the declaratory reliefs sought by the Plaintiffs … it is my respectful submission that the Plaintiffs are asking this Honourable Court to step into the shoes of the Settlement Officer to determine whether the plaintiffs have any customary rights over the purported area claimed by them.' As if to amplify, learned counsel contends: '(T)he determination as to whether any State land likely (sic) that rights of ownership have been acquired by natives by the exercise of their customary rights is solely found on the Settlement Officer assigned by the Director of Land and Surveys, Sarawak under section 84(3) of Land Code.'

[51] Presumably having regards to the provisions particularly those under part V of the Land Code, learned counsel for the second and third defendants says, '… the declaratory relief sought by the Plaintiffs cannot be granted by this Honourable Court as in granting the declaratory relief sought would amount to the determination of any State land where it appears likely that rights of ownership had been acquired by natives by the exercise of their customary rights, which ought to be determined by the Settlement Officer'. It seems what learned counsel is trying to say is briefly that the remedy provided by the Land Code particularly part V thereof, ought to be first exhausted. In support, counsel cites *Barraclough v Brown* [1897] AC 615, ; *Professor Dr Akahar Bador & Ors v Krishnan & Ors (No 2)* [1983] 1 MLJ 412 and *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41.

[52] What appears to be the plaintiffs' submission on the issue of stepping into the shoe of the settlement officer seems to dismiss as wholly irrelevant, such a contention on the part of the second and third defendants. This view of

the plaintiffs, however, must necessarily hinge on the assumption that the NCR they claim to have over the disputed land predate the coming into existence of the Sarawak Land Code. The current legal position would appear to be, where claimants to NCR seek to show, not only that they have NCR, but also that such NCR have persisted throughout the years since the time when the Sarawak Land Code was yet to be born, then depending on the facts and circumstances of each case, unfairness and/or injustice may arise in insisting that those claimants ought to be disallowed from seeking redress by directly seeking the appropriate declaratory reliefs from the appropriate court.

[53] According to the *pegawai tadbir tanah*, Bujang Redzuan bin Mohammed ('DW1') (see witness statement — WSDW1), the land claimed by the plaintiffs 'is within 15½ Mile Penrissen Road Settlement Area which was gazzetted as Settlement Area by virtue of Section 84 of Cap. 81 and were published vide Gazzette Notification No 885 of 24.03.1977'. He testified, based on the record kept presumably in the Lands and Surveys Department Kuching Division, 'the Plaintiffs never submitted their claims for the subject land'. He further testified based on a ground survey over the settlement area done by the Lands and Surveys Department, 'the subject land was an area within river reserved (sic)'. Presumably for that reason the disputed land was not surveyed, and was thereafter 'adjudicated as Riverbank Reserve'.

[54] Concerning the lands adjacent to the disputed land, DW1 testified: 'However, the land adjacent the subject land later was issued with land title ie Lot 82 (now known as Lot 224) and Lot 83, that was claimed by Johem ak Bana for Lot 82 while Lot 83 was claimed by Kongen ak Nyineg. The detail survey being claimed by Johem ak Bana and Kongen ak Nyineg has been recorded in our Survey Book Official Record …'

[55] Examined further as to why the subject land was not surveyed, DW1 replied: 'By virtue of Section 93 of Cap.81, any person that having rights over state land may submit their claim to the Settlement Officer and it is the duty of the said Settlement Officer to exercise his power under Section 94 to determine whether the claim is genuine (in term of having NCR) and as well as determine the limit boundary of land being claimed. Survey will be carried out according to the decision made by the said Settlement Officer. Occasionally, there are 2 venues for objection by the claimants if the area was not surveyed according to their claim ie during the presentation of claim to the Settlement Officer at the specified place and time and upon gazette of Settlement Officers' decision under Section 95 of Cap 81. In the event that any claimants disagree with the decision made by the Settlement Officer, they may appeal to the court of a Magistrate of the First class by a petition in writing made within three months

from the date of the publication in the Gazette of the Settlement Order containing the decision which is the subject of appeal as prescribed under Section 102 of Cap 81'.

[56] According to DW1, upon the publication of the settlement order, in respect of the subject land there was no appeal received, 'and therefore, land titles was (sic) then issues to Johem ak Bana for Lot 82 (now known as Lot 224) and Kongen ak Nyineg for Lot 83 under Section 18 respectively'. It appears to be DW1's evidence that upon expiry of the settlement order, the subject land remained as unclaimed state land. DW1 testified, 'Furthermore, from my investigation, the subject land was never claimed by anybody due to the land is (sic) riverbank reserve'.

[57] In cross-examination, DW1 testified he ever received claims pertaining to river and riverbank reserve. According to him, '… pursuant to Section 38 of Sarawak Land Code (Cap.81) all the applications on the river and the riverbank reserve has been rejected outright'. Cross-examined as to whether he ever 'query and identify the neighbours to Kongen and Johem's land', DW1 testified under s 94(1) of the Sarawak Land Code, 'it is mandatory for any of the Settlement Officers to query and identify the neighbours …' According to him, based on the record that he has access to, he 'did not see the name of the plaintiffs as one of the neighbours mentioned'. He further testified he was aware of the plaintiffs' claim only 'during this proceeding'.

[58] Further cross-examined, DW1 testified based on the record he has access to, he could not find any claim of either the first plaintiff or the her late husband or the claim of both of them. Referring to the set of claim sheet (exhs D-DBOD(2) – 13) of Kongen ak Nyineg, DW1 testified neither the first plaintiff nor her late husband Duing ak Nyugen was ever mentioned or recorded as neighbours to Kongen ak Nyineg. DW1 further testified based on the claim sheet of Johem ak Bana, he also did not find the name of either the first plaintiff or her late husband, Duing ak Nyugen. According to DW1, even based on the survey record on pp 6, 12 and 21 of DBOD(2), he could not find the names of the first plaintiff or her late husband. Cross-examined further, based on the file he has access to, he could not find any objection letter from either Jusy ak Mesin or her late husband, Duing ak Nyugen.

[59] Further cross-examined, DW1 testified: 'However, for the case of claim (of NCR) made by Jusy ak Mesin, I found out there is no 'catatan', notes referring to ownership of land or claim by Jusy ak Mesin as you can see in pages 6 and 21 of DBOD(2). In the said two records of survey of presumably Johem ak Bana's land referred to, the name of Johem ak Bana is stated, but neither Jusy ak Mesin nor Duing ak Nyugen is stated anywhere in the two documents.

[60] It is to be noted that the question as to why either the name of Jusy ak Mesin or Duing ak Nyugen or both ought to be mentioned therein, has substantially been left to inference based on primarily on the probable indication based on the evidence, that the lands of Johem ak Bana and Kongen ak Nyigen are adjacent to the subject land, and therefore the information that the claimants to the subject land are Jusy ak Mesin and/or her late husband Duing ak Nyugen, if well-founded, ought to have somehow come to the knowledge of those presumably Lands and Surveys Department personnel who prepared pp 6 and 21 of DBOD(2). Hence, the second and third defendants' implied contention, that if the plaintiffs' claim as regards the subject land is well-founded (in terms of NCR, exact location, whether or not within river reserve, etc), then the name of Jusy ak Mesin and/or Duing ak Nyugen, in all probability, ought to have been stated in the aforesaid two documents.

[61] Learned counsel for the plaintiffs suggested to DW1 to the effect, that Johem ak Bana and Kongen ak Nyineg did not claim their respective land exceeding the pegs as shown on p 23 of DBOD(2), 'because they know it is someone else's land based on their own information'. Part of DW1's reply was, 'There are (sic) possibility they know the limit or boundary should there be another claimant adjacent to their land. However, if there exist another claimant, the staff surveyor will mark on the D-BOOK (see pages 12 and 21 of DBOD(2)) the names of the neighbor. There are (sic) possibility that both Johem ak Bana and Kongen ak Nyineg are applying to do survery more than pegs 66, 65, 64, 63, 73, 72, 71 and 70. If not because of section 38 of the Land Code, there are possibility the surveyor may survey more than pegs 66, 65, 64, 63, 73, 72, 71 and 70'. This testimony seems to suggest, that due primarily to s 38 of the Land Code, the survey pertaining to the lands claimed by Johem and Kongen, in any case, could not go beyond pegs 66, 65, 64, 63, 73, 72, 71 and 70. On closer scrutiny, however, perhaps the question could have been more appropriately tailored, so that its intent is not capable of multiple interpretations.

[62] The plaintiffs' counsel then put DW1: 'Since you say that there is possibility that Johem ak Bana and Kongen ak Nyineg apply to do survey more than pegs 66, 65, 64, 63, 73, 72, 71 and 70, then I put to you that the 1st Plaintiff has the Native Customary Rights land in the area where Johem ak Bana and Kongen ak Nyineg have their land been surveyed'. DW1 replied: 'There are possibility (sic), however, the existence of Native Customary Rights claim has to be acknowledged by the community and not to be determined by any staff surveyor or settlement officer. We have to understand that apart from staff surveyor and settlement officer, there exists another committee called Settlement Committee to confirm the rightful claimant. I really believe that if the Native Customary Rights of the 1st Plaintiff exist on the said land it will be detected by the Settlement Committee prior to the issuance of the Issue

Document of Titles to both Johem ak Bana and Kongen ak Nyineg'. According to DW1 the Settlement Committee comprises of local Headman and a few Kampung folks appointed by the settlement officer to assist settlement officer in adjudication of Native Customary Rights'.

[63] Next, learned counsel for the plaintiffs referred DW1 to a 'Rubber Stencil' (ID-PBOD-4(a) and (b)). Concerning the locality stated therein, 'Tembangkang S.Kisa', DW1 testified he is not aware that 'the present claim by the first Plaintiff in relation to her Native Customary Rights land is also situated at Tembangkang'. He further testified, '… there is no mark or annotation to word 'Tembangkang' in our field book record as per pages 6, 12, 15, 19, 20, 21, 22 and 23 of DBOD(2)'.

[64] Still on rubber stencil, DW1 testified: 'Rubber stencil is not a permit as stipulated under section 10 of the Land Code, however, we do consider the document as a proof of continuous occupation as laid under section 5 of the Land Code. Therefore, it is an onus to the claimant to prove that the rubber stencil issued is [] referring to the land under claim because in rubber stencil we hardly find specific lot or land referred to'. Cross-examined further, he agreed that the rubber stencil can be considered as document 'as proof of continuous occupation' 'provided it is not contravene to (sic) Section 101 and section 135 of Sarawak Land Code'. These two provisions contemplate of, inter alia, situations where no compensation shall lie against the State Government of Sarawak.

[65] Cross-examined by the plaintiffs' counsel on the publication of the s 84 settlement notification presumably on 24 March 1977, DW1 told the court, 'The Copy of the gazette are also extended to Divisional Officers as well as District Office and affected local Headman'. While acceding to the possibility that the first plaintiff or her late husband might be unaware of the aforesaid publication, at the same time DW1 testified: 'However, based on my finding a lot of attempt to having dialogue at the area has been held. Therefore, I would believe the notification of the area under Settlement Operation has been cascade to the local sufficiently'.

[66] DW1 had testified that 'the details of claimants and areas being claimed will be displayed for public examination and checking pursuant to Section 95 of the Sarawak Land Code. Therefore, it is very rare case where any land being surveyed during Settlement Operation would wrongly surveyed because it is subject to public inspection. The Settlement Officer would only issue the land title after the expiry of the Settlement Order …' Further cross-examined whether DW1 has evidence on the display of presumably 'the details of claimants and areas being claimed', DW1 replied, 'Based on the file I have

access to, I observe that a copy of schedule to be displayed at Ketua Kampung house has been acknowledged receipt (sic). The same goes to the copy of schedule displayed at District Office'.

[67] DW1 subsequently produced copies of acknowledgement of receipts pertaining to one Dunggap ak Paon and Unyui ak Nyatoi both dated 10 February 1979 ie exhs D-4A and D-4B respectively. The contents of both exhibits are similar. As an example, the substance of the latter acknowledgement receipt states: 'I, Unyui ak Nyatoi … of Kampung Bawang hereby certify that I have received Copy of Section 88 Notice (3rd batch) and Settlement Order (2nd Batch) 15 1A Mile Penrissen Road from the Superintendent of Lands and Surveys, First Division on 10.02.79'. Underneath is presumably the left thumb print of Unyui ak Nyatoi and at the left hand side is a signature of a witness who wrote 'Contents explained by me'.

[68] DW1 also produced an acknowledgement receipt, exh D5 (the contents of which are mutatis mutandis similar to that of exhs D4A and D4B, signed by *Penghulu* Ajis ak Sibek of Kampung Bawang. Also adduced through DW1 is a copy of the s 95 'settlement order' dated 22 January 1979 which lists, inter alia, the lot no, acreage, category of land, names and addresses of persons entitled to rights, and share of each person. One of those listed in exh D6 is Kongen ak Nyineg whose land presumably is Lot 83.

[69] Cross-examined by the then counsel for the second and third defendants, the first plaintiff (PW1) agreed that in 1978, the lands and surveys did carry out a survey presumably over the area covering the disputed land. She further agreed that the purpose of the survey was for the settlement operation, and that the settlement operation was for the purpose of issuing land titles to the land claimants. The first plaintiff testified those surveyed were issued with land titles. She agreed the lands adjacent to the subject land belong to Johem and Kongen, and that both Johem and Kongen did submit their claims in 1978.

[70] The second and third defendants' counsel thereafter put to PW1: 'I put it to you that you and your husband did not submit any claim therefore no title was issued to you and your husband …' To this, the first plaintiff disagreed, saying: *'My husband and I did go to Land and Survey Department, we did enquire from the Land and Survey Department*'. When put to her that the subject land is a river reserve presumably thereby resulting in the lands and surveys refusing to issue land title, PW1 disagreed. Cross-examined further, *PW1 testified she and her husband went to the Land and Survey Department presumably to enquire in 1978, 'one week after the survey was carried out …'* However, according to her, she and her husband did not fill any form at the Lands and Surveys

Department. She agreed that 'the other claimants in Kampung Bawang or area surrounding were issued with land title'. (Emphasis added.)

[71] Based on the aforementioned evidence elicited from the first plaintiff, learned counsel for the second and third defendants contends: 'One can only conclude that they (presumably the 1st Plaintiff and her late husband) have knowledge pertaining to the occurrence (of presumably the Settlement Operation) but remain (sic) silent or sleep over their rights. There is no evidence that the Plaintiffs had protest (sic) or complain (sic) over the non-issuance of document of title to their purported land despite knowing that the other claimants have been issued with document of title (sic) to their (sic) pursuant to the settlement operation'.

[72] The second and third defendants' counsel also refers to DW1's evidence, that if concerning the subject land, native customary rights of the plaintiffs exist — '(such rights) will (sic) be detected by the Settlement Committee prior to the issuance of documents of title to both Johem ak Bana and Kongen ak Nyineg, (the owner of the neighboring land to the subject land)'. Learned counsel further submits: 'Based on the above evidence and section 102 of the Land Code … the Plaintiffs should lodge an appeal against the decision of the Settlement Officer or the Superintendent of rejecting their claim over the subject land, if indeed they had submitted their claim over the subject land to the Plaintiffs during the survey done in 1978. But the Plaintiffs had failed to do so. Therefore … the remedies for which the Plaintiffs are seeking are remedies available under section 102 … As such the filing of the Suit is to circumvent and/or evade the requirements provided in Section 102 of the Land Code, such as the need to appeal within three months from the date of the publication in the Gazette of the Settlement Order'.

[73] Section 102(1) of the Land Code contemplates of, inter alia, any person being aggrieved 'by any act or decision of the Settlement Officer, or by any decision of the Superintendant to exercise or refrain from exercising the power conferred by section 18 …' Section 18 of the Land Code states: 'Where the Director, subject to any direction from the Minister *is satisfied that a native has occupied and used any area of unalienated State Land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes*, he may, subject to section 18A, issue to the native a grant in perpetuity of that area of land …'

ABUSE OF LEGAL PROCESS

[74] Referring to exhs D4A, D4B, D5, D6 and DW1's testimony of the second defendant's having published and extended the schedule of native customary rights to the divisional office and local headman, learned counsel for

the second and third defendants contends: 'There is no evidence adduced by the Plaintiffs during the trial that they have no knowledge over the matter. As the Plaintiffs did not commence their action under section 102 of the Land Code to appeal against the decision of the Settlement Officer but tried to circumvent the necessity provided under that section and as such they have be (sic) guilty of abuse of legal process.'

ESTOPPEL

[75] Additionally it seems, the second and third defendants' counsel also submits, 'the PW1 (1st Plaintiff) is estopped by her conduct from resiling to exercise her rights under section 102 of the Land Code to object and appeal against the decision of the Settlement Officer in not entertain (sic) her rights over the subject land. The Plaintiffs are also stopped from contending that the acquisition of the purported NCR land is in breach of section 8 and/or section 15 of the Land Code because it is not in the first place and now cannot blow hot and cold at the same time in trying to reap inequitable advantage by declaring or claiming the subject land as their NCR land when they have an opportunity during the settlement operation to do so'.

[76] The substance of the plaintiffs' counsel's reply to the submission of counsel for the second and third defendants laid out above, seems reflected in the following portion of the plaintiffs' submission: 'It was totally wrong for the 2nd and 3rd defendants to state that the Plaintiffs fail to follow the proper procedure as the 2nd and 3rd defendants in their action acquiring the Plaintiffs' land without investigating first the existence of native customary rights, left the Plaintiffs no other recourse but seek the Court's declaration.'

[77] The afore-mentioned submission of the plaintiffs, however, seems to fly in the face of DW1's testimony laid out earlier. The evidence adduced through DW1 — see for instance his testimony and exhs D4A, D4B, D5 and D6 — quite clearly indicate, that the second defendant through the settlement officer and settlement committee put up effort presumably to ensure only the lands of rightful claimants were surveyed and were thereafter issued issue documents of title. And the first plaintiff having acceded not only of being aware that the settlement operation was being conducted, but also that she and her late husband had sometime in 1978 actually gone to the Lands and Surveys Department to enquire presumably about the subject land, it would be fair and reasonable to infer that at all material times there were ample opportunities for the plaintiffs to pursue at the relevant Lands and Surveys Department their

rights pertaining to the subject land.

CONCLUSION

[78] It was basically based on all the grounds adumbrated above that the plaintiffs' claim was dismissed with costs to be taxed unless otherwise agreed.

Plaintiffs' claim dismissed with costs to be taxed unless agreed.

Reported by Kohila Nesan